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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 55

UNITED STATES OF AMERICA,
Appellant,

—v.—

E. I. DU PONT DE NEMOURS AND COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION FOR LEAVE TO FILE ATTACHED BRIEF FOR CLARA M. BLUM AND NORMAN S. GOETZ, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ALBERT BLUM; FRANCIS H. BLUM, JOHN A. BLUM AND ALFRED L. ROSE, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY L. BLUM; IRVING TRUST COMPANY, EMIL GOLDMARK, ALFRED L. ROSE AND LINDLEY G. PASKUS, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF BENJAMIN G. PASKUS; AND LINDLEY G. PASKUS, EMIL GOLDMARK AND ALFRED L. ROSE, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF KATHERINE PASKUS, AS *AMICI CURIAE*

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The Trustees of the aforesaid Trusts, respectfully move for leave to file the attached brief as *amici curiae,* in support of the Appellees in this cause, pursuant to Rule 42 (3) of the rules of this Court. Attorneys for the Appellees have consented to the filing. Such consent was requested

of the Solicitor General by the Trustees' counsel in June of 1960. By letter, dated July 8, 1960, consent was refused.

The Trustees above named requested such consent upon learning that none of the stockholders of Appellee, E. I. du Pont de Nemours and Company (herein "du Pont") would be directly represented. The Trustees believed that they should advise the Court of the impact of the proposed divestiture upon the innocent beneficiaries of these Trusts who would be directly and adversely affected by divestiture. As these papers were being prepared, Trustees' counsel were informed that the Solicitor General has recently consented to the filing of briefs *amicus* by Messrs. Dallstream and Cowen, who served as *amici curiae* in the court below. However, as pointed out in the Government's brief (page 6), these *amici curiae* were not to be "partisan". The brief presented herewith is designed to be and is frankly partisan.

The aforesaid Trusts own in excess of 40,000 shares of du Pont common stock, as follows:

	No. of Shares	Date of Death	Cost* Basis
Trust u/W Albert Blum f/b/o Clara M. Blum	20,000	5/ 1/40	$691,400
Trust u/W Henry L. Blum f/b/o Frances C. Blum	16,000	8/22/45	$655,000
Trust u/W Benjamin G. Paskus f/b/o Lindley Garrison Paskus	4,000	1/28/51	$343,250
Trust u/W Katherine Paskus f/b/o Lindley Garrison Paskus	200	3/ 7/50	$ 25,000

The Trustees believe that through the filing of a brief on their behalf, this Court will be given a capsule picture of the injustice that would be visited upon du Pont stock-

* Value at date of death or optional valuation date.

holders, if their holdings of du Pont stock were divested, as requested by Appellant.

The annexed brief, for the filing of which we seek permission, will briefly point out that neither the earlier opinion of this Court nor Section 15 of the Clayton Act requires divestiture; that Judge LaBuy properly exercised a sound discretion in shaping his decree so as to prevent improper use of du Pont's voting power, etc., in violation of the Clayton Act, while at the same time avoiding untold hardship to innocent stockholders; and that the Government's request for immediate divestiture regardless of the effect on the stockholders of du Pont is unjustifiable and would constitute a reversal of this Court's earlier decision which called attention to the "large discretion" vested in the District Courts "'to model their judgments to fit the exigencies of the particular case'" (353 U. S. 586, 607).

Such a presentation, which will emphasize the actual tax effect of divestiture upon the stock owned by these Trustees, will necessarily be different from and not repetitious of the more composite treatment of the situation which undoubtedly will be found in the briefs of the Appellees.

The accompanying brief

A. Considers the tax consequences upon the beneficiaries of the four Trusts in the event that the Government's proposed judgment below were adopted. It will analyze the tax effect in the event that the stock distribution were allocated to income, as well as the harsh consequences if allocated to principal. It will indicate that in the event of an allocation to income, all other income of the beneficiaries of some of these Trusts would be insufficient to pay the tax which would be imposed upon the distribution of the General Motors stock. If allocated to principal, a substantial portion of the stock would have to be sold to pay the tax on the distribution.

B. Indicates how the inevitable forced sale of General Motors stock by various du Pont stockholders would have a disastrous effect on the market value of the stock, thus compounding the difficulty that would confront these Trustees and their beneficiaries from the distribution which the Internal Revenue Service has already ruled would constitute ordinary income for tax purposes.

C. Sets forth the various estate problems which will be visited upon these Trustees, who must make the choice of allocating such a stock dividend between income and principal.

D. Finally, demonstrates that other suggested alternatives would have little less harmful tax and market consequences upon the shareholders of du Pont who, as noted by the court below, were entitled to consideration in carrying out this Court's direction for a solution of the problem through the exercise by the District Court of its "large discretion," so as to provide a judgment which would "fit the exigencies of the particular case."

The Trustees, therefore, respectfully move that they be granted leave to file the accompanying brief.

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Interest of *Amici*

The interest of the *amici* is set forth in the motion for leave to file this brief.

Argument

Proceedings to Date.

In June, 1957, this Court held the acquisition by E. I. du Pont de Nemours and Company (hereinafter "du Pont") of approximately 63,000,000 shares of common stock of General Motors Corporation (hereinafter "General Motors") violative of Section 7 of The Clayton Act (15 U. S. C. A. 18), and remanded this case to the District Court

> "for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute" (353 U. S. 586, 607).

In doing so, this Court pointed out that the

> "District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.'" (*Ibid.* 607-608.)

The District Court initiated its proceedings on September 25, 1957 (R. 3) and, on the same day, appointed *amici curiae* instructing them that,

> "* * * it will be their duty to offer plans, to make such reasonable investigation of the situation as is proper to enable them so to do and to study the various plans proposed by the litigants and to make their recommendations to the Court * * *" (R. 10-11).

The District Court declared

> "that it is in the interest of the public welfare that the Court be fully informed of all aspects of the case and

particularly with respect to the effect which the plan or program finally worked out by this Court will have upon the public interest and upon the interest of the stockholders generally of both E. I. du Pont de Nemours and Company and General Motors Corporation" (R. 10).

Between October 25, 1957 and August, 1958, proposed final judgments were submitted to the District Court by the several parties (R. 3185).

Appellant's proposed judgment was submitted to the Commissioner of Internal Revenue. As stated in the opinion of the District Court, the Commissioner ruled that:

"under the Government's proposed judgment the annual dividends payable by du Pont in shares of General Motors stock would be taxable as ordinary income to the extent of du Pont's current earnings and accumulated earnings and profits. In the case of individual stockholders the Commissioner ruled that the amount of the dividend would be the fair market value . . . of the General Motors shares at the time of each annual distribution" (R. 3187).

Hearings commenced on February 16, 1959 after the parties had taken depositions and submitted interrogatories (R. 3185). Appellant presented its evidence on twelve hearing days between February 17th and March 16th, 1959. The Appellees and the *amici curiae* presented their evidence on twelve hearing days between March 16th and April 1st. After Appellant had presented its rebuttal on four hearing days, briefs were filed and the case submitted in June, 1959 (R. 3203).

The court rendered its opinion on October 2, 1959 (R. 3265). Its final judgment, dated November 17, 1959, provides in part:

"XII"

"Jurisdiction is retained in order to enable any party hereto or any person enjoined or restrained hereby to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of this Judgment or any of the provisions thereof, or for the enforcement of compliance therewith and punishment of any violations thereof. . . . " (R. 3300-3312, at 3302).

On the basis of this voluminous record* and assisted by the two impartial friends of the court, the District Court, in its well reasoned opinion, found that divestiture was not necessary "in order to prevent the consequences condemned by the Statute" (R. 3246), that divestiture would have "very serious adverse consequences," that "it would be unreasonable and unjust for the Court to adopt measures which are certain to result in losses to innocent stockholders when the effects offensive to the statute can be eliminated by measures which will not result in such consequences" (R. 3247), and that to "order a divestment of du Pont's title, with the resulting tax penalties and market implications . . . would . . . constitute a serious abuse of discretion" (R. 3260).

In reaching its decision, the court "considered whether there might be modifications of the Government's plan or other forms of divestiture of the legal title which might reduce or mitigate these adverse consequences" (R. 3248). It concluded that no plan or method of divestiture could be developed which "would not either impair the value of the property interests involved or impose severe tax conse-

* The printed record of the proceedings below consists of over 3,000 pages. Certain documents and exhibits were omitted by stipulation (R. 3321).

quences upon the stockholders of the du Pont Company" (R. 3249).

Notwithstanding the vast amount of material accumulated during this lengthy period and diligently considered by the District Court, Appellant now urges this Court to order divestiture and to direct the lower court to start anew on the road of exploration, to develop a suitable method of divestiture, which neither court nor counsel nor impartial *amici curiae* have heretofore been able to find.

I

Divestiture is neither required nor needed.

It is not the purpose of this brief to argue at length the question whether divestiture in this case is mandatory as a matter of law. That issue will undoubtedly be fully considered in the briefs of counsel for the parties. Suffice it here to point out:

A. *This Court's instruction to the District Court on remand made no mention of divestiture.*

On the contrary, the District Court was directed to determine, after hearing,

> "the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute",

it being noted that the District Courts were

> "clothed 'with large discretion to model their judgments to fit the exigencies of the particular case'" (353 U. S. 586, 607-608).

B. *Section 15 of the Clayton Act differs from Section 11 in that it does not specify divestiture as the sole remedy.*

Section 15 (15 U. S. C. A. 25) does not even mention divestiture. It invests the District Courts

> "with jurisdiction to prevent and restrain violations of this Act"

and lodges with the several District Attorneys of the United States the duty to

> "institute proceedings in equity to prevent and restrain such violations."

Section 11 (15 U. S. C. A. 21), which governs proceedings before a commission or board hearing a Section 7 case, specifically provides that, upon finding of violation, it shall issue

> "* * * an order requiring such person to cease and desist from such violations, and divest itself of the stock . . . held * * *"

For the Government, therefore, to argue that "The Federal Trade Commission has from the outset required divestiture . . . " and that therefore a court of equity must do the same (see Government's brief, pp. 32 *et seq.*) is patently unsupportable.

The only logical conclusion that may be drawn from the difference between these two sections is that Congress did not intend to lodge discretion with the administrative agencies, but desired that courts of equity, before which Clayton Act cases would be tried under Section 15, continue to have their historical equitable powers to exercise their "* * * large discretion to model their judgments to fit the exigencies of the particular case' " (353 U. S., at p. 608).

In *Hecht Co.* v. *Bowles,* 321 U. S. 321, dealing with the grant of jurisdiction to the District Courts to issue compli-

ance orders for the enforcement of the Emergency Price Control Act of 1942, this Court declared:

> "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made" (p. 329 of 321 U. S.).

From the foregoing, it is clear that divestiture is not mandatory in this case. Nor is divestiture needed where, as here, the judgment below is more than adequate to remedy the Clayton Act violation found by this Court.

C. *The District Court's judgment provides adequate remedy.*

The judgment below deprives du Pont, Christiana, Delaware, and their respective officers and directors, of voting rights in General Motors stock.

Except for General Motors stock allocable to Christiana and Delaware and to the officers and directors of the three companies, the voting rights with respect to the General Motors shares held by du Pont are passed through to the many thousands of du Pont stockholders.

All officers and directors of du Pont, Christiana and Delaware are prohibited from serving as directors or officers of General Motors. Likewise, General Motors is prevented from employing anyone in any capacity who is employed by any of these companies. In addition, the judgment contains prohibitions against preferential trade agreements between du Pont and General Motors.

Indeed, the judgment goes so far as to cancel existing requirements contracts between du Pont and General Motors, and to prohibit any new requirements contracts for a period of three years after which period such contracts

of not more than one year's duration will be permitted (R. 3264-3265).

To contend, as does Appellant, that the cumulative effect of the safeguards embodied in this judgment is inadequate and that the District Court abused its discretion, is insupportable on the record, on reason, and by any standard of business realities.

II

The District Court correctly held that divestiture in this case is not feasible without inflicting harsh punitive injury upon innocent stockholders.

During the two year period devoted by the District Court to the task of promulgating "a decree which will remedy the violation of Section 7 of the Clayton Act, without penalizing those who may become the innocent victims of this case, the stockholders and the beneficiaries in various trusts and institutions" (R. 3197), many alternative methods were considered and examined.

Appellant urged divestiture in its proposed judgment, regardless of the ruinous consequences to hundreds of thousands of concededly innocent stockholders (R. 3185-3187). *Amicus* Dallstream suggested a method of voluntary "take-down" of General Motors shares by du Pont stockholders which admittedly did not remove, but was designed to alleviate, the confiscatory consequences of Appellant's proposal (R. 3190-3192). The court below, after careful consideration of these proposals,* rejected them (R. 3260-3261, 3263).

If Appellant's position were correct that divestiture is the only proper remedy, despite the absence of any such

* The court acted on the proposed judgments of Appellant and *amicus* Dallstream only after each was submitted to the Commissioner of Internal Revenue for his detailed ruling as to their tax consequences (R. 3187, 3190).

requirement in the statute and the absence of any such direction in the earlier opinion of this Court, then nothing further need be said. But the Appellant goes further. It urges that divestiture should have been ordered here even if the trial court had discretion. It takes the further position that the stockholders of du Pont and General Motors need not be hurt by divestiture.

We have a right to assume that the Government's proposed judgment below, presented after many months of consideration, was the best possible plan that the Government could present which would provide for divestiture and at the same time avoid disastrous consequences to innocent stockholders.

The District Court, in its judgment, expressly retained jurisdiction "in order to enable any party hereto * * * to apply to this Court at any time * * * for the modification . . . of this Judgment or any of the provisions thereof * * * " (R. 3312).

Therefore, any proposal which the Government may wish to make which would resolve this problem by a new plan should be made in the trial court where full consideration may be given to it. It is not sufficient for the Government hopefully to assert here that some way will be found to have divestiture without visiting upon the stockholders the harmful tax and market consequences envisaged by the court below after a full consideration of all relevant factors.

We examine, therefore, the consequences of Appellant's proposed judgment below in order that this Court may have a picture of how it would have affected the four Trusts of which the *amici* are the Trustees.

The record indicates that approximately 24% of the total beneficial ownership of du Pont common stock is held by

trusts (DPX 24, R. 1378, 3030). Therefore, the position of the Trusts herein will be illustrative of the effect of Appellant's proposed judgment upon substantial numbers of du Pont stockholders.

A. *The impact of Appellant's proposed judgment upon the four Trusts herein and their beneficiaries.*

The *amici* are Trustees of four testamentary trusts holding du Pont common stock as indicated below:

	No. of Shares	Date of Death	Cost* Basis
#1: Trust u/W Albert Blum f/b/o Clara M. Blum	20,000	5/ 1/40	$691,400
#2: Trust u/W Henry L. Blum f/b/o Frances C. Blum	16,000	8/22/45	$655,000
#3: Trust u/W Benjamin G. Paskus f/b/o Lindley Garrison Paskus	4,000	1/28/51	$343,250
#4: Trust u/W Katherine Paskus f/b/o Lindley Garrison Paskus	200	3/ 7/50	$ 25,000

The governing instruments require that each of the above Trusts distribute its entire net income currently to a single life beneficiary (who is the same individual in the case of the two Paskus Trusts).

1. The Disastrous Tax Consequences.

Appellant's proposed judgment would require the distribution by du Pont of 1/10th of its General Motors stock during each of 10 years—*i.e.*, 6,300,000 shares per year (R. 3186). Under the ruling of the Commissioner of Internal Revenue, said distribution would be taxed to individual recipients (including trusts and their beneficiaries)

* Value at date of death or optional valuation date.

as ordinary income at the value of the General Motors stock at the time of distribution (R.-3187).

If such stock were allocated to income and treated as currently distributable to the life beneficiaries, its value would be taxed to such beneficiaries. 1954 I. R. C. §652. If the stock were allocated to principal, its value would be taxed to the trusts. 1954 I. R. C. §§641, 643(a)(4), 651.

Tax Consequences if Distribution Is Allocated to Income.

The following table* indicates the extent of the tax burden upon beneficiaries of said Trusts on the assumption that General Motors stock distributed as dividends over a 10-year period would be allocated to *income*:

Beneficiary Under Trust	Additional Taxable Income**		Taxes†		Balance After Taxes	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	$107,640	$1,076,400	$88,424	$884,240	$19,216	$192,160
#2	$ 86,112	$ 861,120	$74,692	$746,920	$11,420	$114,200
#3 & #4††	$ 45,788	$ 457,880	$33,727	$337,270	$12,061	$120,610

* Figures used are predicated upon the assumptions that General Motors stock will be distributed in addition to normal cash dividend and will have a value of $40 per share. Calculations are based on 1959 tax rates and income of the present beneficiaries, with adjustments to eliminate nonrecurring items.

** After deducting trustees' income commissions.

† Total Federal and New York taxes, taking into account deductibility of New York tax in computing Federal tax.

†† On reaching his 40th birthday in 1960, half the corpus of each of the two Trusts (#3 and #4) of which Lindley Garrison Paskus is the beneficiary was distributed to him, under the terms of the Wills. The distributions included 4,200 shares of du Pont common stock, which Mr. Paskus now holds individually. Calculations with respect to the Paskus Trusts include GM stock to be distributed on both trust-held and individually-held du Pont stock.

In the case of the beneficiaries under Trusts #1 and #2, the taxes payable on the General Motors stock distribution, as shown in the foregoing table, would far exceed the beneficiaries' total net income from all other sources, taxable and tax-exempt, after taxes, even without taking into account the necessity for these beneficiaries, who are elderly widows, to spend a portion of such net income for their living expenses. Consequently, it is obvious that beneficiaries in the position of the beneficiaries under Trusts #1 and #2 would find it necessary to sell enough General Motors stock to pay the tax on the distribution.

The table which follows sets forth the number of shares to be received by the beneficiary of each Trust, the number of shares required to be sold in order to pay for the taxes thereon (assuming sale immediately on receipt at the same price at which the stock is required to be included in income) and the number of shares remaining after such sales:

Beneficiary Under Trust	No. of Shares to Be Received		No. of Shares Required to Be Sold*		No. of Shares Remaining	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	2,760	27,600	2,211	22,110	549	5,490
#2	2,208	22,080	1,868	18,680	340	3,400
#3 & #4	1,159	11,590	844	8,440	315	3,150

* This figure is arrived at by dividing the total Federal and New York taxes which would be due on the distribution by $40, the assumed market price per share of General Motors stock.

Tax Consequences Assuming Distribution Is Allocated to Principal.

In the event that the distribution were allocated to *principal*, this would be the tax effect:

Trust	Taxable Income From General Motors Distribution*		Tax** on Said Income		Balance After Taxes	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	$110,400	$1,104,000	$73,471	$734,710	$36,929	$369,290
#2	$ 88,320	$ 883,200	$55,888	$558,880	$32,432	$324,320
#3	$ 22,080	$ 220,800	$ 8,294	$ 82,940	$13,786	$137,860
#4	$ 1,104	$ 11,040	$ 196	$ 1,960	$ 908	$ 9,080

* It is assumed that this distribution will be the only ordinary income taxable to the Trusts. Figures used are predicated upon the further assumptions that General Motors stock will be distributed in addition to normal cash dividend and will have a value of $40 per share.

** Includes Federal and New York income tax.

Since the Trusts have no cash to pay the taxes on the General Motors stock received in kind, the Trustees would be forced to sell on receipt at least enough of the stock each year to provide sufficient cash for such taxes. If such sale is made immediately on receipt at the same price at which the stock is required to be valued for tax purposes, the tax effect would be as follows:

Trust	No. of Shares to Be Received		No. of Shares Required to Be Sold*		No. of Shares Remaining	
	Per Year	For 10 Years	Per Year	For 10 Years	Per Year	For 10 Years
#1	2,760	27,600	1,837	18,370	923	9,230
#2	2,208	22,080	1,399	13,990	809	8,090
#3	552	5,520	208	2,080	344	3,440
#4	27.6	276	4.9	49	22.7	227

* This figure is arrived at by dividing the total Federal and New York State taxes which would be due on the distribution by $40, the assumed market price per share of the General Motors stock.

These tables dramatically illustrate the ruinous tax consequences to the Trusts herein and their beneficiaries, whether the distribution is allocated to income or to principal. In either event, the result is the same: the beneficiaries of these Trusts would, at the end of the ten-year period of distribution, find the principal from which they derive their income sharply depleted. In short, they would have suffered the equivalent of a capital levy.

2. The Impact of a Declining Market.

The foregoing discussion and tables are based upon the assumption that the average market price of General Motors stock would remain stable during the period of distribution. It is obvious, however, that the market price of both General Motors and du Pont (see pp. 21-22, *infra*) would inevitably decline under the pressure of heavy selling by the innocent victims of the Government's proposed divestiture plan. The confiscatory nature of the Government's proposal becomes all the more apparent, when the tax burden is viewed in conjunction with such a declining market and its corrosive effect on the value of the stock distributed. This confiscatory aspect would be particularly stark if the price were to drop so substantially from the value at receipt that the entire proceeds of the General Motors stock sold would be insufficient to pay the taxes thereon, and other assets would have to be sold in order to make up the deficiency.

As was stated by David A. Lindsay, now the General Counsel for the Treasury Department, in testimony before the Senate Finance Committee on proposed amendments to the Internal Revenue Code dealing with the very type of antitrust divestiture here involved:

> "If people have to pay a dividend tax on a value of 50, and by the time they can turn around and sell the stock it is depressed because of other sales and

forced sales to a value of 25, that to me probably would be confiscation, not because of the tax law but because of the surrounding circumstances, * * * the surrounding circumstances would be, I suppose, the decree and the effect of the decree." Hearings Before Senate Committee on Finance on S. 200, 86th Cong., 1st Sess., 288 (1959).

Estate Problems Arising from Appellant's Proposal.

In addition to the tax and market problems presented Appellant's proposed judgment of divestiture, said proposal raises difficult estate problems for the Trustees.

The Will of Benjamin G. Paskus and the two Blum Wills give the Trustees discretion as to allocation of the various types of corporate distributions between principal and income. The Will of Katherine Paskus requires the Trustees to allocate "extraordinary dividends" payable in stocks of other corporations to principal. However, "ordinary stock dividends paid regularly in lieu of or in addition to regular cash dividends" are, under said Will, to be considered income and not principal.*

The Trustees under the Katherine Paskus Will—or the Surrogate's Court—would have to determine whether under

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*The pertinent provision of the Katherine Paskus Will is in part as follows:

"that all extraordinary dividends payable in stocks, whether of the corporation declaring the same or of any other corporation, * * * shall be considered principal and not income; that ordinary stock dividends paid regularly in lieu of or in addition to regular cash dividends shall be considered income and not principal; * * *. The determination of my trustees as to whether dividends payable in stock are ordinary or extraordinary, and their determination as to whether any such stock dividend should be apportioned or set apart in whole or in part to principal or to income * * * shall be conclusive and binding upon all persons interested in the trust estate."

New York law the distribution of General Motors stock regularly for 10 years would be an "extraordinary dividend" or a stock dividend "paid regularly" and whether any portion of the dividend allocated by the Trustees to principal could be subject to attack as an invalid accumulation.*

Despite discretion as to allocation vested in the Trustees named in the other Wills, the exercise of such discretion would, likewise, present a problem in view of the fact that the proposed distribution would, in the aggregate, represent 31% of the capital value at current market price** of the du Pont stock held by them.

If the distribution of General Motors stock were allocated to income, these are the approximate percentages of the capital value of each trust which would be transferred to the income beneficiaries:

Trust u/W Albert Blum	26.8%
Trust u/W Henry L. Blum	18.5%
Trust u/W Benjamin G. Paskus	13.1%
Trust u/W Katherine Paskus	5.7%

* Under the New York cases, it is not clear to what extent a corporate distribution which is income, as a matter of law, may validly be required to be accumulated by a provision of a will defining it in such fashion as to require its allocation to principal. *Cf. Equitable Trust Co.* v. *Prentice*, 250 N. Y. 1 (1928). As to whether a distribution of the type here in question would be treated in the first instance as income or principal in its entirety, or as apportionable, compare *U. S. Trust Co.* v. *Heye*, 224 N. Y. 242 (1918) with *Matter of Benary*, 194 Misc. 271 (Surr. Ct. 1949) and *Matter of Villard*, 176 Misc. 852 (Surr. Ct. 1941).

** This percentage is computed on the basis of a market price of $41.50 for General Motors and of $184 for du Pont at the close of the New York Stock Exchange on December 9, 1960, and on the further basis of treating 1.38 General Motors shares as allocable to each du Pont share (R. 3186).

The allocation of such a large portion of trust assets to income quite obviously would pose difficulties for any trustee who is impartially discharging his fiduciary obligations to both life beneficiaries and remaindermen.

On the other hand, if the *amici* were to decide to allocate such stock distribution to principal, the allocation might be attacked as an unlawful accumulation.*

B. *The Consequences of Sale of the du Pont Stock by the Amici Prior to Divestiture.*

The Trustees, in view of the foregoing, may feel compelled, in discharge of their fiduciary obligations, to consider the sale of du Pont stock held by their Trusts prior to the time when a court-ordered divestiture might take place.

The unequal income tax consequences to the four Trusts herein, resulting from such sales are set forth in the table which follows:

Trust	Proceeds of Sale*	Cost Basis	Taxable Gain on Sale	Federal Tax**	% of Trust Principal Taken by Tax on Sale
#1	$3,680,000	$691,400	$2,988,600	$747,150.00	12.2%
#2	$2,944,000	$655,000	$2,289,000	$572,250.00	11.1%
#3	$ 736,000	$343,250	$ 392,750	$ 98,187.50	4.7%
#4	$ 36,800	$ 25,000	$ 11,800	$ 2,950.00	1.2%

* Assumed market price of $184 per share.

** There will also be a New York State tax, the bracket depending on the amount of other income realized in the year of sale and taxable to the trust.

The foregoing table illustrates the unequal tax results of Appellant's proposal in its brief on appeal that du Pont

* New York Personal Property Law §16. The amendment by c. 453, L. 1959, permitting accumulations beyond minority is inapplicable to Trusts under wills of decedents dying before September 1, 1959.

stockholders be allowed to exchange their du Pont stock for the equivalent in market value of General Motors stock held by du Pont, assuming the correctness of Appellant's assumption that capital gain would necessarily result.

It is obvious that many stockholders with a high tax basis, such as the Paskus Trusts (#3 and #4), who can escape the burdens involved in continuing ownership of du Pont stock by selling the stock prior to the effective date of any court-ordered distribution will do so. It is equally obvious and inescapable that such mass selling will result in further impairment of market price.

Those holding their du Pont stock at a low tax basis, such as the Blum Trusts (#1 and #2), are far less fortunate. Whether they sell or sit by to await the tax consequences of divestiture, these stockholders must ultimately see their investment shrink under the impact of a declining market on the one hand, and prohibitive taxation on the other—both a direct result of the proposed decree.

C. *The Consequences of a Distribution of the General Motors Stock by du Pont as a Stock Dividend in Lieu of All or Part of the Existing Cash Dividend.*

It is no answer to suggest that the impact on the beneficiaries and, therefore, the inducement to sell du Pont stock beforehand would be reduced if General Motors stock were paid by du Pont as a dividend in lieu of all or part of the existing cash dividend. Obviously this would not alleviate, but exaggerate, the severity of the tax impact on beneficiaries such as those here involved.

If beneficiaries who are already in very high income tax brackets have difficulty finding the funds to pay taxes on General Motors stock received in kind, where such stock is distributed in addition to the regular du Pont cash divi-

dend, the beneficiaries' problem would be far more difficult if heavy taxes on the General Motors stock would have to be met out of cash income which is depleted by a reduction in the normal du Pont dividend.

Furthermore, for du Pont to withhold normal cash dividends, during the period it is distributing the General Motors stock in kind, solely to alleviate the income tax burden on its stockholders would result in an accumulation of cash for which it has no foreseeable use (R. 3248). Du Pont might thus be subjected to the heavy penalty surtax imposed by Section 531 of the Internal Revenue Code of 1954.

The fact that du Pont is a publicly held corporation would not afford it any immunity from such surtax. *Cf. Trico Products Corporation* v. *Commissioner*, 137 F. 2d 424 (2 Cir. 1943); *Trico Products Corporation* v. *McGowan*, 169 F. 2d 343 (2 Cir. 1948).

CONCLUSION

Divestiture is not mandatory; it is not required by the governing section of the Clayton Act; it is not needed. The judgment below effectively cures the Clayton Act violation. The impact of a decree of divestiture upon the Trusts represented by the *amici* herein demonstrates that if divestiture were ordered as the Government requests on this appeal, unnecessary ruinous tax and market consequences would be visited upon the stockholders of du Pont.

The judgment of the District Court should, therefore, be affirmed.

Respectfully submitted,

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